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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

No. 1005

■

GEORGE BOHNKE and
MRS. HENRY T. (Eloise) BROWN
*Petitioners*

*v.*

THE PEOPLE OF THE STATE OF NEW YORK
*Respondents*

■

# PETITIONERS' REPLY

## to Respondents' Brief in Opposition to Petition for Writ of Certiorari

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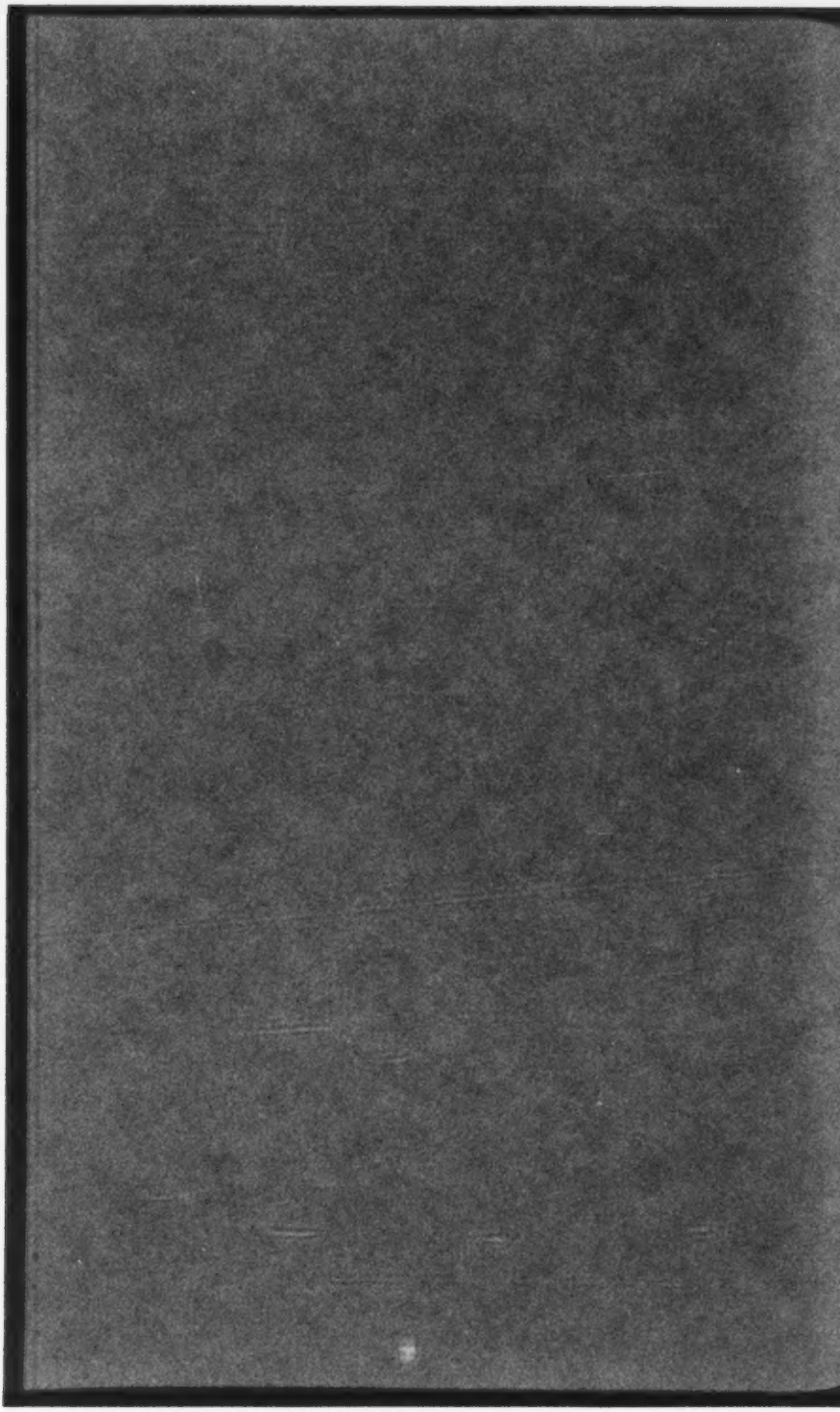

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# PETITIONERS' REPLY

## to Respondents' Brief in Opposition to Petition for Writ of Certiorari

Respondents claim authority for the ordinance in question under the statutes of the State of New York duly enacted. We discuss such statutes relied upon by respondents.

Ordinance No. 28 is not authorized by Village Law (S. 89, subd. 58-A) because entering premises of another without prior consent is not trespass. The ordinance does not prohibit trespass but makes it illegal to be a licensee or invitee.

Subdivision 48 (Village Law, S. 89), authorizing regulation and restriction of peddling from house to house, is unconstitutional on its face in so far as it pertains to dissemination of printed matter. The ordinance

does not purport to regulate peddling or distribution of literature in any manner as to time or place; but it is an outright *restriction* and *prohibition* of such rights. That part of above statute about hawking cannot constitutionally apply to preaching the gospel because Jehovah's witnesses are declared by the courts not to be peddlers within the meaning of such laws. *Schneider* v. *State,* 308 U. S. 147; *State* v. *Meredith,* 15 S. E. 2d 678; *Iowa* v. *Mead et al.,* 300 N. W. 523; *Cantwell* v. *Connecticut,* 310 U. S. 296, where this Court unanimously *held* that

> "the statute, *as construed and applied to the appellants,* deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment *has rendered the legislatures of the states as incompetent as Congress to enact such laws.* . . . Freedom of conscience and freedom to adhere to such . . . form of worship as the individual may choose cannot be restricted by law. . . . In every case the [legislative and police] power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." [Italics added]

The village has power to prohibit trespassing, but not the right to revoke a license or an implied invitation as is attempted by this ordinance. No statute authorizes this "Green River" type of ordinance. It exceeds legitimate police power. If there were a statute authorizing it, both would be unconstitutional.

As it would be ordinarily applied, the ordinance reaches only peddlers of *ordinary* articles of merchandise. Under such application it may be considered appropriate police regulation;[1] but see certain cases cited *infra* (pp. 10-11, footnote[8]), where the identical ordinance has been declared invalid as to *commercial* canvassing and peddling. Under circumstances of commercial canvassing it may be doubtfully considered appropriate police regulation.[2]

When applied to preaching of the gospel from house to house and to free-of-charge (i.e., *gift*) distribution of information and opinion in pamphlet or otherwise-recorded form, the ordinance becomes and is unconstitutional, as applied to the facts.[3] The ordinance here questioned, both on its face and by its express terms, invades the right of freedom of the press secured by the Fourteenth Amendment against hostile invasion by the state or a political subdivision thereof. It is immediately apparent that the *village* has not complied with the Federal Constitution in enactment or enforcement of the ordinance in question.

The *police power* mentioned in *Barbier* v. *Connolly*, 113 U. S. 27, has its limitations, recognized by this Court, when the *fundamental personal* rights of freedom of worship and press are concerned. These limitations applicable here are well stated in Freund's work on "The Police Power" (p. 133, s. 143), where it is said:

> "The questions which present themselves in the examination of a safety or health measure are: does a danger exist? is it of sufficient magnitude? does it concern the public? does the proposed meas-

[1] *Town of Green River* v. *Fuller Brush Co.*, 65 F. 2d 112.
[2] *Town of Green River* v. *Fuller Brush Co.*, supra; *Schneider* v. *State*, supra.
[3] *Schneider* v. *State*, supra; *Hannan* v. *Haverhill*, 120 F. 2d 87; *Donley* v. *City of Colorado Springs*, 40 F. Supp. 15; *Zimmermann* v. *London*, 38 F. Supp. 582; *Borchert* v. *City of Ranger* [Tex.], 42 F. Supp. 577.

> ure tend to remove it? is the restraint or requirement in proportion to the danger? is it possible to secure the object sought without impairing essential rights and principles? does the choice of a particular measure show that some other interest than safety or health was the actual motive of legislation?"

There is no rational connection between the unusual and extraordinary method of "control" provided for through this ordinance and the ends claimed to be thereby achieved, viz., prevention of burglary, thievery, etc., from house to house.

The ordinance is not limited to those who enter residential property without prior invitation *for an unlawful purpose.* Were its application so LIMITED it would doubtless be constitutional; but the ordinance *prohibits* such entry *even for lawful and proper purposes.*

Under the ordinance the United States *postman* could be prosecuted. Petitioners went on the premises in the same manner and for the same proper purpose as does the United States postman, to wit, to carry and leave upon the premises for occupants thereof a message from another in which there is a mutuality of interest.

So could the Southampton police arrest and prosecute every Western Union messenger boy who distributes messages at the homes—uninvited, and who (even as the *postman*) often brings to residents unwanted and unpleasant, even annoying, messages.

The ordinance ignores entirely the implied invitation that is extended by each resident or householder to anyone who calls at reasonable times for any and all lawful purposes. Today nearly every owner of residential property demonstrates that such implied invitation exists through his placing at the outer entrance a door-

bell or knocker. In Southampton, unless the occupant has been contacted by letter or telephone for previous consent (thus making greater trouble for the occupant), one entering the premises for any good and lawful purpose could be jailed—he could not determine whether he was welcome or that his entry was consented to until he actually asked the occupant or servant at the door.

The law could not be *equally* applied under all like circumstances, as required by the *Federal* Constitution, because enforcement of the ordinance would depend on whether or not the one contacted or interviewed at the door agreed with, approved or liked the caller or his message delivered or tendered at the door. If it conformed to the philosophy of the occupant, the chances of prosecution would be "nil"; if it did not so conform, the caller could be prosecuted and convicted.

Opinions of neighbors differ, and such differences are not known to the caller until he has opportunity to discuss them with the occupant. The most appropriate place is at the homes of the people. (*Schneider* v. *State,* supra) One distributing circulars on a local political controversy on an issue in which *the village* was divided would run the risk of being convicted for each and every instance where the message delivered was unacceptable to the householder, and for which delivery the caller could be interned[4] *for the duration* of the political campaign, or even longer, depending on the manner and the number of householders reporting his visits to the "gestapo" of the village!

In this relation the ordinance is very like Hitler's Nazi police regulation which requires *every stranger* entering a German town or village to register with the police.[5]

[4] And he would be if the caller's campaign did not have the approval of the "village fathers".

[5] At Southampton similar regulation is *more severe,* for one must submit himself to the local climate for six months before he can 'register' with the police.

If the caller resided in the village for six months, however, he would be *free* to "trespass" and be otherwise thereby licensed to make a nuisance of himself and call from house to house for any unlawful and illegal purpose, i.e., motive. This inequality is patently unconstitutional and void. It is unreasonable. A sneak thief who anchored himself in the village for six months would be free to "invade" the property of all in the village.

The very fact that burglaries and thievery in Southampton continue, as in every other community, and no sneak thief or burglar has been prosecuted under the ordinance in question, is proof conclusive that the claimed aims do not justify the means employed. This is especially true as to application of the ordinance to the facts in this case where it is admitted that Jehovah's witnesses are not of the class specifically aimed at by the ordinance (i.e., upper-story craftsmen and sneak thieves). See Opinion, Judge of County Court, R. p. 73, fols. 218, 219.

The cases of *San Francisco Shopping News Co.* v. *City of South San Francisco,* 69 F. 2d 879, and *Buxbom* v. *City of Riverside,* 29 F. Supp. 3, relied upon by respondents, are not in point. There the ordinances did not prohibit entry upon the property. The literature involved *commercial solicitation for sale of ordinary articles of merchandise* or printed *commercial advertising* and NOT 'printed public opinion, information, etc.' In *Schneider* v. *State,* supra, by dictum it was held that commercial soliciting and canvassing—involved in the *Shopping News* and *Buxbom* cases, supra—could be regulated and restricted; but held that when such laws are applied to press activity of Jehovah's witnesses same are unconstitutional. Mr. Justice Roberts said:

> " . . . Mere legislative preferences or beliefs respecting matters of public convenience may well

support regulation directed at *other personal activities,* but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. . . .

"*Frauds* may be denounced as offenses and punished by law. *Trespasses* may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that *considerations of this sort do not empower a municipality to abridge freedom of speech and press.*" [Italics added]

The municipality cannot restrict or prohibit press activity from house to house as it also cannot restrict such activity on the streets. Mr. Justice Roberts said:

"And perhaps the most effective way of bringing them [pamphlets] to the notice of individuals is their distribution *at the homes of the people.*" [Italics added]

By denial of certiorari in the *Shopping News* case, supra, this Court did not approve the strange analogy and sophistry advanced by respondents here. (Cf. *Bowden et al.* v. *City of Fort Smith, Ark.,* No. 314 October Term 1941, certiorari *denied* Oct. 13, 1941, 62 S. Ct. 99, AND THEREAFTER on March 16, 1942, certiorari *granted;* see, also, *United States* v. *Carver,* 260 U. S. 482, 490.) Furthermore, that *Shopping News* case and the *Buxbom* case, supra, have been expressly overruled by *Hague* v. *C. I. O. et al.,* 307 U. S. 496, affirming 101 F. 2d 774. In the *Hague* case the Circuit Court of Appeals concerning an ordinance identical in terms with the ordinances in *Shopping News* and *Buxbom* cases, supra, said:

> "Such an ordinance is *invalid upon its face* in that it violates freedom of speech and of the press, fundamental civil rights protected by the Fourteenth Amendment from any abridgment by State action. *It is squarely within the decision of the Supreme Court of the United States* in Lovell v. City of Griffin, 303 U. S. 444." [Italics added]

The ordinance here is not similar to the one involved in *San Francisco Shopping News Co.* v. *City of South San Francisco,* supra. The Southampton ordinance actually does *forbid manual delivery* of publications by carrier to a member of the household. Therefore the basis for holding the South San Francisco ordinance valid does not apply here. Such is not in point. There the Circuit Court of Appeals said:

> " . . . The ordinance does not forbid the manual delivery of the publication by the carrier to a member of the household; . . . "

Here no claim or intimation is made that petitioners *forced* their message on anyone. If it can be considered as "forcing", then every United States postman in the country is guilty of 'forcing himself upon others' in their homes and 'invading their privacy'; and such is equally true of every Western Union messenger in the country.

The fact that the message delivered and left by petitioners was for the benefit of the householder clearly implies that no one could properly object. There is no evidence that petitioners *actually trespassed* or refused to leave when ordered to do so. There is no claim that any householder objected to the contents of the literature or the method of distribution. There is no evidence or finding supporting the claim by respondents that petitioners "forced" or imposed their beliefs upon the

"religious beliefs" of any resident in the fair and lovely village of Southampton.

The ordinance does not secure to the residents their "privacy" as contended. The law, on the contrary, *unlawfully* (i.e., unconstitutionally) "imprisons" inhabitants of the unique village, by keeping away from said inhabitants all persons who would bring to them a message of benefit and mutual interest. Even the postman is not excepted from the terms of this vicious, un-American ordinance.

The New York trespass statutes are sufficient to protect the householder in event the caller enters after notice not to do so, or refuses to leave after being requested to do so. There is no rational need for the unreasonable invasion here by the "village fathers" of the right of the householder or resident to determine for himself, in every case as it arises, whether the particular visitor or his message is or is not desired after the resident has had opportunity to consider and decide. It is time enough for the village trustees, who, respondents say, are the sole custodians of the Federal Constitution, to intervene when an actual trespass is discerned, and not before.

The subtle argument made by respondents under the guise of protecting "privacy"[6] should be rejected. We do not believe that this Court will hold that the "trustees" of the village can by legislative fiat 'push the head of every resident under the sand' (as the proverbial ostrich voluntarily "beheads" itself when danger approaches), thus to blind the residents to the real danger that threatens them and all other Americans as warned by petitioners in the leaflets distributed "without price" *in the public interest.*

This Court has the power to reject—without oral argument, discussion or expression of opinion—the

[6] *Privacy* is "swung", i.e., strained, stretched and distorted, by respondents so as to prevent an approach *for any purpose* toward the home of another.

argument or reasons advanced by Jehovah's witnesses[7] as to why this Court ought to grant certiorari and hear this case. Surely this Court will not (by any *in pectore* decision, withholding expression in writing of its reasons, for the benefit of *all*) overrule the discreet judgment, logical discussion and just conclusion reached by fourteen other courts, State and Federal, holding such "Green River" type of ordinance as is here involved unconstitutional both on its face and as construed and applied.

Here let members of the Court read the cases referred to.[8]

[7] *Leoles* v. *Landers*, 302 U. S. 242.
*Coleman* v. *City of Griffin*, 302 U. S. 636.
*Hering* v. *St. Bd. of Educ.*, 303 U. S. 624.
*Watch Tower* v. *Bristol*, 305 U. S. 572.
*Gabrielli* v. *Knickerbocker*, 306 U. S. 621.
*Johnson* v. *Town of Deerfield*, 306 U. S. 621.
*Stewart* v. *Commonwealth*, 309 U. S. 674, 699.
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*Hussock* v. *People of N. Y.*, 312 U. S. 659.
*Leiby* v. *Manchester*, 313 U. S. 562.
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*Trent* v. *Hunt*, 314 U. S. ....., 62 S. Ct. 115.
*Bevins* v. *Prindable*, 314 U. S. ....., 62 S. Ct. 116.
*Morante* v. *People of N. Y.*, 314 U. S. ....., 62 S. Ct. 632.

[8] *Borchert* v. *City of Ranger* (Tex.) *et al.*, 42 F. Supp. 577 (ordinance of City of Ranger); R. pp. 85-89, containing unreported decree, findings of fact and conclusions of law of United States Dist. Ct., West. Dist. of Ark., involving Harrison (Ark.) ordinance in *Widle* v. *Harrison et al.; Donley* v. *City of Colorado Springs*, 40 F. Supp. 15; *Zimmermann* v. *London*, 38 F. Supp. 582; *City of Columbia* (S. C.) v. *Alexander*, 119 S. E. 241;

It appears that the profound and learned explication those other courts have given the instant question (contrary to the reasoning and conclusions of the New York Court of Appeals and the Suffolk County Court) deserves and justifies a thorough analysis, discussion and consideration and determination of the issue with and by this Court. Such can ensue only upon the granting of certiorari as prayed for in the petition herein and setting of the case for oral argument.

## Conclusion

**The writ of certiorari should be granted.**

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*Attorney for Petitioners*

[Footnote *continued* from preceding page]

*Real Silk Hosiery Mills* v. *City of Richmond, Calif.*, 298 F. 126; *Ex parte Maynard*, 275 S. W. 1071; *City of Orangeburg* v. *Farmer*, 181 S. C. 143; 186 S. E. 783; *Jewel Tea Co.* v. *Town of Bel Air*, 172 Md. 536; 192 A. 417; *Prior* v. *White*, 180 So. 347; 116 A. L. R. 1176; *White* v. *Town of Culpeper*, 172 Va. 630; 1 S. E. 2d 269; *N. J. Good Humor, Inc.* v. *Bd. of Comm.*, 11 A. 2d 113, 114; *City of McAlester* (Okla.) v. *Grand Union Tea Co.*, 98 P. 2d 924; *De Berry* v. *City of La Grange, Ga.*, 8 S. E. 2d 147; *Jewel Tea Co.* v. *City of Geneva, Nebr.*, 291 N. W. 664; *Hague* v. *C. I. O. et al.*, 101 F. 2d 774; 307 U. S. 496.